Nos. 18-422 and 18-726

In the Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AND THE DISTRICT OF MARYLAND

BRIEF FOR THE AMERICAN JEWISH COMMITTEE AS AMICUS CURIAE SUPPORTING APPELLEES

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INTEREST OF AMICUS CURIAE[1]

The American Jewish Committee ("AJC") is a nonpartisan global advocacy organization with more than 125,000 members and supporters and 34 offices worldwide. It was founded in 1906 to protect the civil rights of American Jews and all Americans. AJC works closely with multinational institutions, governmental agencies, civil society groups, and Jewish communities to uphold and defend democratic principles and combat bigotry and fractionalization. AJC has long acted on the principle that individual rights are best protected in a functioning representative democracy in which our government officials are subject to contested elections and accountable to their constituents. Because partisan gerrymandering of the sort involved in these cases threatens to undermine democratic accountability, it compromises the values central to AJC's mission.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

In *Wesberry* v. *Sanders*, this Court noted that "no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." 376 U.S. 1, 17 (1964). The principal way in which the People express their political preferences is, of course, at the

1. Counsel for all parties have consented to the filing of this brief. Under Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution to fund the preparation or submission of this brief. No person other than *Amicus*, or its members or counsel, made a monetary contribution to the preparation or submission of this brief.

ballot box. This Court has rightfully been vigilant when government authorities have sought to dilute the franchise in violation of the Equal Protection Clause.[2] But partisan gerrymandering, "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power," *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015), also violates First Amendment rights, and the harms implicated go beyond those experienced on election day.

Both district courts below found that the majority parties in the North Carolina and Maryland legislatures intended to subordinate adherents of the rival political party and to entrench themselves—textbook cases of partisan gerrymandering. See Rucho J.S. App. 287–288; Benisek J.S. App. 48a–51a.

The courts below also concluded that the partisan gerrymandering effected by the majority parties in North Carolina and Maryland not only intentionally diluted the voting power of the adherents of the minority party in the legislature, but also thereby systematically burdened those political minorities' abilities to express themselves, associate with like-minded others, and advocate for their views. This Court has already determined that such partisan gerrymandering is incompatible with democratic principles. *Arizona State Legislature*, 135 S. Ct. at 2658 (citation omitted). These harms are redressable—and

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2. See, *e.g.*, *Baker* v. *Carr*, 369 U. S. 186, 206 (1962); see also *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 495 (2006) (Roberts, C.J.) (noting that the same techniques at work in partisan gerrymandering, when deployed against certain identifiable racial and language minority groups, "dilute minority voting power").

should be redressed—as First Amendment violations for the reasons that follow.

I. Partisan gerrymandering undermines democracy by subverting the public's expectation that the government will be accountable to the People. It not only insulates the majority party from accountability at the polls, but also stifles the public debate that is indispensable to meaningfully contested elections. When the majority in the legislature need not fear the outcome of the next election, it is perceived to be—and, as the empirical literature shows,[3] becomes in fact—less responsive to the electorate. And, when the majority party takes advantage of its legislative dominance to draw district lines with the specific intention of entrenching its own power, polarization and extreme partisanship result.

What incentive does the public have to actively participate in the political marketplace of ideas if electoral and policy outcomes appear to be predetermined by district lines? And what incentive is there to organize in opposition to the majority if the party in power has drawn the map to enhance its own voice and to diminish that of those who hold different political views? Such lack of government neutrality offends the principles that animate the First Amendment.

II. Fortunately, the First Amendment also provides the framework for addressing these harms. In particular, applying this Court's jurisprudence on associational burdens and the flexible test adopted in *Anderson* v. *Celebrezze* would allow this Court to distinguish between partisan gerrymandering intended to subvert and burden

3. See sources cited p. 8 n.8, *infra*.

opposing political viewpoints and valid redistricting exercises in which political affiliation is considered for legitimate purposes.

Furthermore, other lines of First Amendment doctrine reflect the need to protect minority views from retaliation, viewpoint discrimination, and speaker-based discrimination. These protections have long been regarded as key to safeguarding the marketplace of ideas. The same concerns that have moved this Court to intervene in those contexts previously are present in the cases before it now.

III. Partisan gerrymandering invariably undermines the ability of the voters to remedy this issue themselves. In the absence of judicial intervention, then, partisanship becomes further entrenched and democracy erodes. This Court has the necessary competence—and the constitutional obligation—to step in before the ongoing malfunction of the marketplace of ideas turns into a durable market failure.

Therefore, AJC urges this Court to uphold the district courts' decisions in these cases and hold that the partisan gerrymander carried out by the legislatures in North Carolina and Maryland violate the First Amendment.

ARGUMENT

I. Partisan Gerrymandering Undermines Public Trust in Representative Democracy.

The background principles that animate this Court's First Amendment jurisprudence underscore that our

democracy suffers as a result of partisan gerrymandering. Our system of government is premised on the notion that citizens may effect change by electing new officials who "through words and deeds will reflect [the] electoral mandate" of the public. *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015). A corollary of that premise is that "the voters should choose their representatives, not the other way around." See *Arizona State Legislature*, 135 S. Ct. at 2677 (quoting Mitchell Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781 (2005)).

Partisan gerrymandering interferes with electoral accountability by diluting the votes of minority party-supporters, making it substantially harder for them to elect their preferred candidates and thereby enact their favored policy choices.[4] Partisan gerrymandering also compromises the exercise of First Amendment liberties that guarantees government accountability beyond election day.

The "fundamental principle of our constitutional system" is that "the opportunity for free political discussion" is necessary to ensure "that government may be responsive to the will of the people." *Stromberg* v.

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4. As scholars have noted, "the fact that it requires a shift in voter sentiment of historic proportions to cause a small change in partisan distribution of House seats shows how far we have strayed from the simple idea that elections are supposed to provide a check on the government by offering a meaningful threat to remove legislators from office in ordinary, not just extraordinary, times." Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 Ohio St. L.J. 1121, 1135 (2007).

California, 283 U.S. 359, 369 (1931). And while the First Amendment certainly protects the speech of the "lonely pamphleteer,"[5] it also protects the national tradition of political associations in which citizens "band together in promoting among the electorate candidates who espouse their political views," *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000). Yet a major effect of partisan gerrymandering is to undermine that ability of citizens to band together.

This Court has already acknowledged that targeted speech suppression undermines the promise of government accountability. "[W]henever [a] constituent can be restrained in any manner from speaking, writing, or publishing his opinions," particularly when those opinions are critical of government conduct, we worry that "public functionaries" may in effect be "absolved from their responsibility to their constituents." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 297 (1964).

The same is true when a clever legislature finds a way to burden opponents' speech and expressive association without overtly making it unlawful. Public officials in charge of drawing the district lines have the ability to disrupt collective organization and chill their would-be opposition by drawing districting maps that seek to entrench themselves in power. See *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.").

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5. See *Branzburg* v. *Hayes*, 408 U.S. 665, 704 (1972).

The effects here are all the more constitutionally troubling because, by Appellants' own admissions, they burden the speech and associational rights of political minorities "in order to enhance the relative voice" of the party in power, a concept that is "wholly foreign to the First Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 48–49 (1976); see also *U.S. Telecom Ass'n* v. *Federal Commc'ns Comm'n*, 855 F.3d 381, 427 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("The First Amendment operates as a vital guarantee of democratic self-government.").[6] This outcome not only injures the Appellees—it also creates polarized political echo chambers in which citizens lack the opportunity to hear diverse political perspectives and engage in robust public debate of the underlying policy issues.

Throughout its existence, AJC has been an active participant in the marketplace of ideas. It has observed first-hand that vigorous, bipartisan dialogue has the power to bridge divides and meaningfully advance the interests of otherwise disempowered minorities.

By entrenching the power of the majority party, North Carolina and Maryland have attempted to create a "standardization of ideas * * * by legislatures * * * [and] dominant political or community groups." *Terminiello* v. *City of Chicago*, 337 U.S. 1, 5 (1949). "There is no room under our Constitution" for such a result, *id.* at 4, whether it is accomplished by suppressing dissenting or provocative voices or by gerrymandering opponents into political insignificance. As this Court has held, when there is "an attempt to give one side of a debatable public question

6. See Rucho J.S. App. 159, 251; Benisek J.S. App. 49a–50a.

an advantage in expressing its views to the people, the First Amendment is plainly offended." *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 785–786 (1978). And even more detrimentally to our representative democracy, this lack of government neutrality undermines public confidence that the government remains responsive and accountable to the People.[7]

Indeed, beyond its demonstrable practical effects on officials' responsiveness to opposing-party constituent demands,[8] partisan gerrymandering irreparably damages the *perception* of government accountability by creating an expectation that political outcomes are

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7. In a recent poll, 69% of likely voters for 2018, across party lines, signaled that they found it "very concerning" that "partisan gerrymandering and manipulation of district lines" deprives voters of their right to hold their representatives accountable, with 89% of respondents finding that prospect at least "concerning." Lake Research Partners & WPA Intelligence, Memorandum to Interested Parties, *Partisan Redistricting—New Bipartisan Poll*, at 6 (Sept. 11, 2017), https://campaignlegal.org/sites/default/files/memo.CLCPartisanRedistricting.FINAL_.2.09082017%20%28002%29.pdf. Similarly, strong majorities of respondents were very concerned that "[p]oliticians in partisan-rigged districts do not accurately reflect the interests of their constituents" (65%), that such politicians are more loyal to their party than their constituents (68%), and that dominant political parties could become entrenched even when political opinions in a state or district are no longer in agreement (64%). *Ibid.*

8. As Appellees have argued, empirical literature has shown that "gerrymandering sharply skews legislatures (and the laws they pass) in favor of the line-drawing party (and against the will of the electorate)." See League of Women Voters Mot. to Affirm 6 (citing Devin Caughey et al., *Partisan Gerrymandering and the Political Process*, 16 Election L.J. 453 (2017)).

predetermined by district lines. The resulting loss of the public's confidence that it is possible to bring about political change and electoral turnover through the normal channels of the marketplace of ideas—not only at the ballot box but in the long road to the election—has significant effects on the exercise of First Amendment freedoms. Partisan gerrymandering operates to dissuade members of the public at large from participating in politics more generally and disrupts the ability of political parties and their members to effectively advocate for their agendas. See *Gill* v. *Whitford*, 138 S. Ct. 1916, 1939 (2018) (Kagan, J., concurring).

These are not injuries in search of a constitutional theory—these are classic First Amendment violations.

II. The Application of Well-Settled First Amendment Doctrine Provides the Rule of Decision Here.

Traditional First Amendment principles dictate the conclusion that partisan gerrymandering of the kind in which the legislative majorities in North Carolina and Maryland engaged here unconstitutionally burdens protected expressive conduct.

A. Partisan Gerrymandering Burdens the Associational Rights of Parties and Their Members.

Partisan gerrymandering burdens the associational rights of political parties and their members by allowing an incumbent party to burden its opponents' ability to organize and thus mount an effective challenge to that party's rule. Where the associational rights of political

parties are burdened, this Court has frequently stepped in to protect those rights, even where state legislatures have a competing interest in managing the electoral process. This Court should intervene here as well.

It is undisputed on the records before the Court that partisan gerrymandering has impeded the ability of the *Rucho* and *Benisek* political parties and the voter-plaintiffs affiliated with them to associate successfully.

The district court in *Rucho* found that individual plaintiffs testified to harms including "decreased ability to mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates"—in other words, a decreased ability "of their party to perform its core functions"—that amounted to violations of their First Amendment right to associate. Rucho J.S. App. 70–72. The court also found ample evidence of associational injuries suffered by the organizational plaintiffs.[9]

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9. For example, the North Carolina Democratic Party testified that it was difficult to "raise funds and have resources and get the attention of the national congressional campaign committees and other lawful potential funders for congressional races" in districts gerrymandered to prevent Democratic victories. Rucho J.S. App. 71–72. It was likewise difficult to recruit candidates to run in these districts because "'the deck seem[ed] to be stacked'" against them. *Id.* at 72 (quoting the deposition of George Wayne Goodwin on behalf of the North Carolina Democratic Party). The court found that this and similar harms amounted to burdens on Common Cause and the League's right "to associate for the advancement of political beliefs." *Id.* at 74 (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968)).

The *Benisek* court found the plaintiff members of the Republican party suffered similar harms. The court considered testimony of individual plaintiffs facing "new difficulties in their organizational efforts as a result of the redistricting." Benisek J.S. App. 26a. For example, one voter who consistently voted for Republican candidates described speaking to people in the Sixth District who felt it was no longer worth voting after the redistricting. *Id.* at 26a, 62a. The court also drew from data to corroborate individual plaintiffs' testimony—evidence showed a decline in Republican participation at the polls as well as decreased fundraising. *Id.* at 28a, 62a–63a.

In each of these cases "the gerrymander has burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects." *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring).

1. The Burdens Imposed on Appellees' Associational Rights Are Severe and Unconstitutional.

This Court has struck down similar attempts by the legislature to disadvantage members of political parties and other groups by imposing severe burdens on their associational rights. In *California Democratic Party* v. *Jones*, for example, this Court concluded that mandating blanket primaries unconstitutionally burdened the associational rights of political parties. Writing for the majority, Justice Scalia explained that "the First Amendment protects the freedom to join together in furtherance of common political beliefs." 530 U.S. at 574 (citation and internal quotation marks omitted). The

imposition of restrictions, such as blanket primaries, effectively quashes the ability of the party and "the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Ibid.* Those same harms are implicated by the partisan gerrymandering before this Court. That Appellees remain free to register with the minority party does not alleviate the "substantial restraint" on their "exercise of the constitutionally protected right of free association" imposed by partisan gerrymandering. *Kusper* v. *Pontikes*, 414 U.S. 51, 58 (1973); see also Benisek J.S. App. 62a (describing "lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion after the 2011 redistricting by voters").

This Court's jurisprudence acknowledges that the harms at issue here go to the core of Appellees' associational rights. In *Democratic Party of the United States* v. *Wisconsin ex rel. La Follette*, this Court struck down a requirement that the Democratic National Party Convention admit delegates selected in violation of party rules. 450 U.S. 107, 123 (1981). In so holding, this Court explained that granting states the power to place delegates in a National Convention over party objections would prevent the Party from "screening out those whose affiliation is . . . slight, tenuous, or fleeting," thereby inhibiting its ability to politically associate to advance its primary objectives. *Ibid.* (alteration omitted).[10]

10. Accord, *e.g.*, *Cousins* v. *Wigoda*, 419 U.S. 477, 489–490 (1975) (explaining that parties are entitled to some control over the manner by which convention delegates are chosen); *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 213, 229 (1986) (holding the same with respect to primary elections).

Here, as in *La Follette*, the partisan gerrymanders have inhibited the ability of the *Benisek* and *Rucho* organizational and voter-plaintiffs to associate to advance their primary objectives—namely, to promote the success of candidates who will advance their preferred policy objectives. See Rucho J.S. App. 69–72, 74; Benisek J.S. App. 61a–64a. That these gerrymanders did so by systematically undermining the minority parties' ability to affiliate in the first place, as opposed to by interfering with the parties' mechanisms for screening weak affiliations as in *La Follette*, only strengthens the case for judicial review. "By placing a state party [and its supporters] at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). Appellees seek a remedy against a legislative action that "substantially abridged [their] ability to associate *effectively* with the party of [their] choice." *Kusper*, 414 U.S. at 58 (emphasis added).

In *NAACP* v. *Alabama ex rel. Patterson*, this Court held that the First Amendment is violated where legislative actions burden an organization's ability to recruit members. 357 U.S. 449, 462–463, 466 (1958). The NAACP was at risk of being ousted from the state of Alabama and enjoined from advancing its organizational interests because it refused to disclose its membership lists. *Id.* at 453–454. Noting that the NAACP had made an uncontroverted showing that requiring disclosure of the identity of its rank-and-file members would burden its ability to recruit, this Court held that the burdens on the associational rights of the NAACP and the individuals affiliated with it were unconstitutional. *Id.* at 462–463, 466. So, too, here: Both sets of appellants describe

difficulty recruiting members and, in North Carolina, partisan gerrymandering was found to have compromised parties' ability to recruit candidates for office.[11]

2. Even if the Associational Burdens Were Less Than Severe, Partisan Gerrymandering Would Still Fail the Flexible Test This Court Designed in *Anderson* v. *Celebrezze*.

The Court need not conclude that the associational burdens here are severe, or that strict scrutiny is required, to uphold the decisions below.[12] In *Anderson* v. *Celebrezze*, this Court acknowledged that "[c]onstitutional challenges to specific provisions of a State's election laws * * * cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." 460 U.S. 780, 789 (1983) (quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974)). Recognizing the need for holistic inquiry, this Court devised a flexible test that, if applied here, would allow it to weigh different factors to better distinguish between valid redistricting exercises and partisan gerrymandering violative of the First Amendment. In *Anderson*, this Court applied "an analytical process that parallel[ed] its work in ordinary litigation" by "first consider[ing] the character and magnitude of the asserted injury to the [plaintiff's First and Fourteenth Amendment] rights" and weighing those rights against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Ibid.*

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11. Rucho J.S. App. 72.

12. Indeed, the *Rucho* court applied the intermediate scrutiny standard and found that the North Carolina plaintiffs satisfied it. Rucho J.S. App. 286.

Although neither of the district courts below explicitly applied the *Anderson* framework to the partisan gerrymanders before them, both courts analyzed the burdens placed on political activity in a fact-sensitive and nuanced way that is completely consistent with this Court's flexible test. Were this Court to adopt the *Anderson* framework for partisan gerrymandering claims, it would find that Maryland and North Carolina cannot offer any legitimate justifications for the burdens they imposed on Appellees other than their naked desire to disadvantage the political opposition.[13] See Rucho J.S. App. 110 ("Legislative Defendants do not argue—and never have argued—that the 2016 Plan's express partisan discrimination advances *any* democratic, constitutional, or public interest."); Benisek J.S. App. 48a–50a ("[W]ith respect to the mapmakers' intent, the process described in the record admits of no doubt. * * * Democratic officials * * * worked to craft a map that would specifically transform the Sixth District into one that would *predictably* elect a Democrat.").

B. Partisan Gerrymandering Also Flouts Other First Amendment Principles.

The Partisan gerrymandering in which the North Carolina and Maryland legislatures engaged here is also entirely inconsistent with other core First Amendment principles.

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13. The argument that an intent to help one party is not the same as an intent to harm the other was properly rejected by one of the district courts in this case. As that court explained, "[t]he First Amendment does not—indeed, cannot—distinguish between these intents because they are one and the same when applicable to two-party elections." Benisek J.S. App. 50a.

1. Partisan Gerrymandering Amounts to Unconstitutional Retaliation Against Minority Party Voters for Their Political Views Manifested in Their Past Electoral Choices.

Partisan gerrymandering "burden[s] or penalize[es]" individuals "because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." See *Vieth* v. *Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment). Fortunately, this Court can draw from a robust judicial tradition of protecting individuals from impermissible government disfavor or retaliation on account of their political affiliation to remedy these harms.

Indeed, this Court's First Amendment jurisprudence teaches that the government cannot exercise its discretion in a "narrowly partisan or political manner." *Board of Educ., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 870–71 (1982) (joint opinion of Brennan, Marshall, Stevens, and Blackmun, JJ.). That rule is based on the recognition that a single discretionary decision that burdens a person who holds different political views[14]

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14. See *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 65 (1990) (applying the First Amendment to prohibit government employers from making "promotion, transfer, recall, and hiring decisions involving low-level public employees * * * based on party affiliation and support"); *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 715, 717 (1996) (holding that contractors, like government employees, are protected by the First Amendment from patronage dismissals because such dismissals inappropriately subject government employment "to the express condition of political beliefs or prescribed expression" and burden the right to political association).

could chill all his co-partisans. That rationale applies with all the more force to a decision by a government body to draw district lines that burden all adherents of the opposing party across the state, chilling all of its would-be supporters.

The records before this Court show that the message was heard loud and clear. The *Rucho* voter-plaintiffs tasked with "canvassing and get-out-the-vote efforts" had difficulty getting fellow Democrats to vote because "they felt their vote didn't count." Rucho J.S. App. 70. The *Benisek* plaintiffs, who attempted to encourage fellow Republicans to vote in the Sixth District, found that people generally felt that it was "not worth voting anymore," and "[felt] disenfranchised." Benisek J.S. App. 26a. The redrawn district lines resulted in widespread "confus[ion] about the candidates." *Id.* at 27a. As a result, individuals who had associated with a minority party were discouraged from expressing themselves through the electoral process, thereby insulating the incumbent party from the need to be responsive to the electorate.

In *Elrod* v. *Burns*, this Court protected government employees from being penalized on the basis of their political affiliation, holding that patronage dismissals severely curtail "the individual's ability to act according to his beliefs." 427 U.S. 347, 355–356 (1976). As in *Elrod*, the cases before this Court present government action that has the impermissible and undemocratic effect of "tip[ping] the electoral process in favor of the incumbent party" by burdening the right to political speech and association. *Compare ibid.*, *with* Rucho J.S. App. 70 (explaining that the *Rucho* voter-plaintiffs suffered "decreased ability to mobilize their party's base, persuade independent voters

to participate, attract volunteers, raise money, and recruit candidates"). This effect enables the incumbent party to rely on indirect regulation of political association to "produce a result which it could not command directly," in violation of the First Amendment. *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (citation omitted).

2. Partisan Gerrymandering Unconstitutionally Favors Majority Political Viewpoints over Others.

By favoring one set of political beliefs over another, partisan gerrymanders also collide with the First Amendment's prohibition on viewpoint discrimination. Indeed, though this Court has held that a state may restrict speech when necessary to advance a significant and legitimate state interest, there are some interests "such as a desire to suppress support for a minority party" that are "plainly illegitimate." *Members of the City Council of L.A.* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).[15] The two cases before this Court are partisan gerrymanders motivated *solely* by such "plainly illegitimate" interests as party entrenchment and the "desire to suppress support for a minority party." *Ibid.* Appellants concede as much. See Benisek J.S. App. 12a (quoting Governor O'Malley's Deposition confirming that he "set out to draw the borders in a way that was favorable to the Democratic party"); Rucho J.S. App. 221 ("[T]he General Assembly expressly drew the 2011 plan 'to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate.'") (quoting the deposition of one of the principal mapmakers, Dr. Hofeller).

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15. See also *Stromberg*, 283 U.S. at 369–370.

Time and time again, this Court has recognized that "governments must not be allowed to choose 'which issues are worth discussing or debating.'" *Consolidated Edison Co. of N.Y.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537–538 (1980) (quoting *Police Dep't. of Chi.* v. *Mosley*, 408 U.S. 92, 96 (1972)). By extension, the government cannot constitutionally regulate speech in ways that favor some viewpoints over others. See, *e.g.*, *Taxpayers for Vincent*, 466 U.S. at 804. The alternative "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace," an outcome that the First Amendment "places * * * beyond the power of the government." *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). This background prohibition is so essential to First Amendment jurisprudence that viewpoint discrimination is presumptively unconstitutional. *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995).

Partisan gerrymandering, like direct viewpoint discrimination, threatens to drive the minority political view out of the marketplace of ideas by diminishing the voice of the disfavored political party in favor of the majority's view. See *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) ("First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views.").

The First Amendment safeguards these minority views from regulation designed to weaken them well before they are pushed out of the marketplace. By discriminating in the drawing of the redistricting maps and ultimately imposing an electoral penalty, partisan

gerrymandering inexcusably burdens Appellees' choice to advocate for minority party positions and candidates free from government disfavor. Here, the effects of partisan gerrymandering have already taken hold. The time for judicial vindication is now. Indeed, the principle of viewpoint neutrality "protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses." *Matal* v. *Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment).

The mapmaking at issue here functions in the same way as a subsidy to benefit one viewpoint over another, something this Court has held violates the First Amendment.[16] Here, "[t]he direct result" of identifiably associating with, endorsing the views of, or voting for the minority parties "is a state-provided * * * subsidy to a political rival" in the form of a gerrymandered map. See *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 742 (2011) (Roberts, C.J.). And while there is some precedent for *viewpoint-neutral* government

16. See *Rosenberger*, 515 U.S. at 834 (discussing *Regan* v. *Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983)); see also *Nat'l Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587 (1998) ("If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'") (citation omitted); *Leathers* v. *Medlock*, 499 U.S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints.").

subsidies surviving First Amendment challenge, "none of those cases—not one—involved a subsidy given in direct response to the political speech of another, to allow the recipient to counter that speech" more effectively. *Id.* at 743.

3. Partisan Gerrymandering Imposes Discriminatory Burdens on the Basis of a Speaker's Identity as a Minority Party Adherent.

By imposing burdens based on the political affiliation—that is, the partisan identity—of the voter, partisan gerrymandering amounts to impermissible content-discrimination based on the identity of the speaker.

In each of the cases before this Court, the incumbent party drew district lines on the basis of the ascertainable partisan identity of voters with the goal of decreasing the electoral clout of the minority party. See Rucho J.S. App. 159 (quoting Representative David Lewis, one of two officials responsible for the redistricting plan, during a debate on the proposed map, stating "that he believed 'electing Republicans is better than electing Democrats,' and therefore that he 'drew this map in a way to help foster' the election of Republican candidates"); Benisek J.S. App. 21a (quoting talking points for Senate President Thomas V. Miller stating that "[i]n the face of Republican gains in redistricting in other states around the nation, we have a serious obligation to create this opportunity"). These actions amount to the very same speaker-based, indirect censorship traditionally forbidden by the First Amendment, and should not be allowed to stand here.

"Premised on mistrust of governmental power," the First Amendment precludes officials from distinguishing among different speakers—or choosing favorites—out of concern that speaker-based regulations may be "instruments to censor," much like viewpoint restrictions. *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 340–341 (2010). This Court has stepped in to protect against impermissible disfavor in cases comparable to the ones before it now.

For example, in *Citizens United*, this Court held that corporations are entitled to fund independent political broadcasts related to elections because political speech—an "essential mechanism of democracy" that functions as "the means to hold officials accountable to the people"—"must prevail against laws that would suppress it by design or inadvertence." *Id.* at 339. In so holding, the Court concluded that "[t]he First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech," *id.* at 364, because such distinctions "are all too often simply a means to control content," *id.* at 340. The concern is particularly acute where, like here, "[t]he State has left unburdened those speakers whose messages are in accord with its own views." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 580 (2011).

Here, the majority party-controlled legislatures of North Carolina and Maryland did just that. That the disfavored speakers in the cases now before this Court are not subject to a complete ban does not change the outcome. "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content" via targeting of certain speakers. *Id.* at 566.

The partisan gerrymanders burden the political expression of minority parties and their adherents while leaving that of the party in power and its supporters undisturbed and therefore amplified. "This the State[s] cannot do." *Ibid.*

III. Claims of Partisan Gerrymandering Are Justiciable.

A. Courts Should Intervene Because Partisan Gerrymandering Raises the Distinct Possibility That a Legislature Has Entrenched Itself and Is No Longer Accountable to the People.

This Court has used the metaphor of the marketplace of ideas to describe the "[c]ompetition in ideas and government policies" that "is at the core of our electoral process and of the First Amendment freedoms." *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968). The marketplace metaphor is particularly appropriate here, for the harms of partisan gerrymandering described in Parts I and II are akin to market capture. See D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671, 692 (2013) ("What is most disturbing about political gerrymandering * * * is not that it discriminates against some discrete group, but rather that insiders capture and manipulate the very processes from which they draw their legitimacy."). As this Court has recognized, without a functioning marketplace of ideas, "the public could not freely choose a government pledged to implement policies that reflect the people's informed will." *Sorrell*, 564 U.S. at 583.

Because partisan gerrymandering makes it harder to vote the legislatures who adopted the offending

district lines out of office, it is appropriate for the courts to intervene. See *Gill*, 138 S. Ct. at 1935 (Kagan, J., concurring) ("[O]nly the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches.").

In a different context that is instructive here, Chief Justice Warren noted that "the presumption of constitutionality" that often attaches to congressional or other legislative action, is "based on an assumption that the institutions of state government are structured so as to represent fairly all the people." *Kramer* v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 (1969). When a challenge calls into question that "basic assumption, the assumption can no longer serve as the basis for presuming constitutionality." *Id.* Nor can it support any hope for a political remedy for the political process gone awry.

Partisan gerrymandering results in a malfunction of the political marketplace of ideas that is so pervasive that even advocates of minimalist or restrained approaches to judicial review would favor judicial intervention. See John Hart Ely, *Democracy and Distrust* 103 (1980) (recommending an approach in which courts intervene "when the 'market,' in our case the political market, is systemically malfunctioning"); *id.* at 117 (noting that voting rights cases "involve rights (1) that are essential to the democratic process and (2) whose dimension cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo"). The current landscape is the epitome of the "*process* * * * undeserving of trust" that characterizes market malfunction. *Id.* at 103. Here, "the ins [i.e., the political parties in control] are choking off the channels of political change to ensure that they will stay in and the outs will stay out," *and* "though

no one is actually [that is to say, literally] denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility." *Ibid.*

As AJC can attest from its decades of advocacy work around the world, a malfunctioning political process is detrimental to minority populations and can operate to "deny[ ] that minority the protection afforded other groups by a representative system." See *ibid.* That the minorities in question are the two major political parties only speaks to the precision and effectiveness of the partisan gerrymandering threat to the normal channels of the political process. Fortunately, "constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can." *Id.* at 183. And unlike elected politicians whose very own continuance in office may be at stake in the future of partisan gerrymandering, judges are well-positioned to command the trust of the public that they will be neutral arbiters.

B. Our Federal Courts Have Expertise in Ascertaining Legislative Intent.

In order to determine that redrawn maps violate the First Amendment, it may be necessary to determine legislative intent. See *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) ("First Amendment concerns arise where a State enacts a law that has the *purpose* and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views.") (emphasis added). Given the myriad legitimate considerations—

political and otherwise—that go into redistricting,[17] discerning improper legislative intent may prove essential to creating a manageable legal framework for the analysis of partisan gerrymandering. Fortunately, courts are well-equipped to identify illicit legislative intent.

In a hyper-politicized climate, the determination of legislative intent is not always difficult. Here, for instance, the intent to draw legislative maps on the basis of party affiliation is transparent. The district court in *Benisek* found the record to be "replete with direct evidence" of "the specific intent to flip the Sixth District from safely Republican to likely Democratic." Benisek J.S. App. 49a–51a. Similarly, the district court in *Rucho* found that "Plaintiffs adduced more-than-sufficient evidence to prove that, in enacting the 2016 Plan, the General Assembly predominantly intended to 'subordinate' the interests of entities and voters who supported, or were likely to support, non-Republican candidates. Rucho J.S. App. 287–288.

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17. As this Court held in *Karcher* v. *Daggett*, "[a]ny number of consistently applied legislative policies" may qualify as rational, legitimate state interests in the redistricting context, "including, for instance, making districts compact, respecting municipal boundaries, preserving cores of prior districts, and avoiding contests between incumbent Representatives." 462 U.S. 725, 740 (1983). Some of those redistricting objectives may require limited, nondiscriminatory use of political affiliation data—particularly when it comes to incumbency protection, a valid purpose when undertaken "in the limited form of avoiding contests between incumbent[s]." *Bush* v. *Vera*, 517 U.S. 952, 964 (1996) (citation and internal quotation marks omitted; alteration in original).

But even in more challenging cases, there is nothing unusual about courts assessing legislative intent. Courts are experienced in examining a factual record and identifying impermissible intent behind statutes. As this Court has noted, "the mere recitation of a benign * * * purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 (1975). Moreover, this Court has time and again considered a legislature's motive in drawing congressional maps. See, *e.g.*, *Shaw* v. *Reno*, 509 U.S. 630 (1993); *Shaw* v. *Hunt*, 517 U.S. 899 (1996); *Hunt* v. *Cromartie*, 526 U.S. 541 (1999). In *League of United Latin American Citizens*, this Court reiterated that "[i]t is undeniable that identifying the motive for making [the] basic decision [of the state in drawing a new congressional map] is a readily manageable judicial task." 548 U.S. at 457.

The courts play an important role in ferreting out statutes with impermissible invidious intent. Because "a denial of constitutionally protected rights demands judicial protection," *Reynolds* v. *Sims*, 377 U.S. 533, 567 (1964), that is the role the Court should assume here.

C. This Court Has Not Hesitated to Intervene When Comparable First Amendment Liberties Are at Stake.

In protecting First Amendment values in politically polarized contexts, courts not only protect the speaker herself but also safeguard against the chilling of those who, upon witnessing such use of government power, may choose to be silent rather than risk the consequences. See, *e.g.*, *Taxpayers for Vincent*, 466 U.S. at 800–801.

Additionally, these impositions unfairly amplify views that accord with the State's own. See *National Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2377 (2018) (explaining that the imposing a burden on a "curiously narrow subset of speakers * * * run[s] the risk that the state has left unburdened those speakers whose messages are in accord with its own views") (citation and internal quotation marks omitted). As this Court has shown in its myriad cases addressing these kinds of harms, it is willing and able to step in to address these harms.

To be sure, holding that partisan gerrymandering is justiciable here may invite further disputes about partisan gerrymandering, causing the Court to enter the thicket. This Court is familiar with this conundrum, as it confronted a similar situation before adopting the one-person, one-vote standard. Then, as now, for the Court "to stay out of the area altogether * * * would have meant * * * that the ins would simply have gone on maintaining their positions." Ely 124. Such an outcome in the malapportionment context would have been "no more compatible with the underlying theory of our Constitution than taking away some people's votes altogether." *Ibid.* The same is true here, because, as shown above, "partisan gerrymanders * * * are incompatible with democratic principles." *Arizona State Legislature*, 135 S. Ct. at 2658 (alteration and citation omitted).

CONCLUSION

This Court has recognized that "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339. The same is true of the "ability of citizens to band together" for political ends. *Jones*, 530 U.S. at 574. The partisan gerrymandering cases before this Court present serious First Amendment harms that are not susceptible to a political solution and that threaten the democratic experiment as a whole.

Upon which branch of government, if not the judiciary, can the people rely when partisan vitriol threatens to stifle the electoral voice of the minority and infringe upon the right to politically associate? Indeed, Article III courts have confronted these questions so many times and in such varied contexts, that they have developed sophisticated, detailed frameworks to remedy First Amendment violations. "The Constitution is not a document 'prescribing limits, and declaring that those limits may be passed at pleasure.'" *United States* v. *Stevens*, 559 U.S. 460, 470 (2010) (Roberts, C.J.) (quoting *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803)). It is up to the courts to enforce these limits.

For the reasons urged herein, we respectfully ask that the judgments of the courts below be affirmed.

Respectfully submitted,

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